QUESTIONS PRESENTED

1. Under the Railway Labor Act, does an employer impermissibly discriminate among its employees by granting permanent strike replacement status to "cross-over" employees who abandoned the strike to return to work before it ended, thereby granting them preference in reinstatement at the conclusion of the strike over more senior "full-term" striking employees?

2. Under the Railway Labor Act, are individuals who are hired during a strike to become permanent strike replacements, but at the conclusion of the strike are still undergoing formal training away from the situs of the work and have not yet performed any services for the carrier within the meaning of 45 U.S.C. § 181, entitled to be considered as permanent strike replacements not subject to displacement by returning strikers?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
ARGUMENT	5
I. The Eighth Circuit's Decision Finding TWA's Grant Of Permanent Replacement Status To Its Cross-over Employees To Be Unlawful Discrimination Under The RLA Is In Harmony With This Court's *Mackay* And *Erie Resistor* Decisions And Does Not Conflict Materially With Decisions Of The Sixth And Seventh Circuits	5
A. The court's rationale is based upon the traditionl balancing of the rights of the employer and employees in a strike situation which the courts and the NLRB are consistently called upon to do	5
B. The court's ruling does not materially alter the balance of bargaining power between employers and unions or materially conflict with application of these basic principles by other circuit courts	8
II. The Decision Below Affirming The District Court's Ruling That The Approximate 463 Trainees Did Not Acquire The Status Of Permanent Replacements Draws Its Essence From Prior Judicial And NLRB Precedent And Is Not In Conflict With 8he Second And Seventh Circuits	11
A. Contrary to being in conflict with the Seventh Circuit, the Eighth Circuit's decision as to the trainees' issue rests primarily upon the Seventh Circuit's *ALPA v. United Airlines* decision	11

TABLE OF CONTENTS—Continued

	Page
B. In finding support for its ruling on the trainees' issue from NLRA precedent as well, the court correctly analyzed and applied the balancing test found in *Mackay*	13
C. The Eighth Circuit did not invalidate the district court's two-day rule; it simply found the RLA employee definitional approach to be controlling	13
CONCLUSION	14
APPENDIX	
Donovan v. Trans World Airlines, Inc., No. 77-0881 (W.D.Mo. March 4, 1983)	1a

TABLE OF AUTHORITIES

Cases	Page
Air Canada v. NMB, 107 LRRM 2020 (S.D. N.Y. 1980), *aff'd*, 659 F.2d 1057 (2nd Cir. 1981), *cert. denied*, U.S. 965 (1981)	12
ALPA v. United Air Lines, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987)	11, 13
Donovan v. American Airlines, Inc., 686 F.2d 267 (5th Cir. 1982)	12
Donovan v. Trans World Airlines, Inc. (unpublished), No. 77-0881 (W.D.Mo. March 4, 1983)	12
George Banta Co., Banta Div. v. NLRB, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983)	7
Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926 (7th Cir. 1982)	8, 10
International Ass'n of Machinists & Aerospace Workers v. J. L. Clark Co., 471 F.2d 694 (7th Cir. 1972)	8
Laidlaw Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970)	5
NLRB v. American Olean Tile Co., No. 86-5308, *to be reported at* 826 F.2d 1496 (6th Cir. August 13, 1987)	10
NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963)	*passim*
NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967)	4, 5
NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967)	7
NLRB v. Harrison Ready Mix Concrete, Inc., 770 F.2d 78 (6th Cir. 1985)	10
NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938)	*passim*
Randall, Division of Textron, Inc. v. NLRB, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983)	8
Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 809 F.2d 483 (8th Cir. 1986), *cert. granted*, 107 S.Ct. 3183 (1987)	3

TABLE OF AUTHORITIES—Continued

Statutes	Page
Fair Labor Standards Act	
29 U.S.C. § 201	12
Railway Labor Act	
45 U.S.C. § 181	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-548

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The petitioner Trans World Airlines, Inc. (hereinafter "TWA") seeks review of a decision of the United States Court of Appeals for the Eighth Circuit which affirmed the district court's ruling under the Railway Labor Act (hereinafter "RLA") that individuals who were still engaged in formal training at an off-site training facility to become flight attendants at the conclusion of a strike could not be retained and thereby displace returning strikers, and which reversed the district court, holding instead that cross-over strikers who had earlier abandoned the strike likewise could not be retained and thereby displace returning strikers who have greater seniority. The district court had also held in favor of TWA's position with respect to a group of new hires employed at the beginning of the strike; that they were

permanent strike replacements and, therefore, could lawfully be retained at the end of the strike rather than being subject to displacement by returning strikers. This latter holding was affirmed by the Eighth Circuit, and review of this holding has not been requested.

The respondent Independent Federation of Flight Attendants (hereinafter "IFFA") submits that the questions presented by this case are not appropriate for review by this Court and, therefore, opposes the granting of this petition. Despite its efforts in arguing for such review, which includes a generous sprinkling of hyperbole and rather intemperate use of invective directed at some of the panel's reasoning, TWA simply has not shown that the Eighth Circuit's decision, of which a petition for rehearing *en banc* was denied, departs from precedent established by this Court or that it is in material conflict with the decisions of any of the other circuit courts.

IFFA is basically satisfied with TWA's statement of the case and summary of facts in its petition, except for the need to point to certain misstatements contained therein. In the middle of page 4, for instance, TWA asserts that an effect of the decision below is that:

> . . . permanent employees [cross-overs] with considerably more time in the employ of the carrier [than the new hire replacements]—who elected not to support the strike or to return to work at a time when vacancies existed—must surrender their jobs when the strike comes to an unsuccessful end, to the very strikers who were replaced by the new hires . . .

This statement contains several inaccuracies in it. The decision does not require cross-overs to be displaced by senior strikers who were actually replaced by new hires. Rather, it simply requires certain less senior cross-overs to give way to more senior full-term strikers who were replaced, not by new hires, but impermissibly by those less senior cross-overs under the guise that they too were entitled to permanent strike replacement status.

On page 5 of the petition, TWA states that it and IFFA "were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984." This is, of course, contrary to the holdings of both lower courts in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 809 F.2d 483 (8th Cir. 1986), *cert. granted*, 107 S.Ct. 3183 (1987), which held that the parties' agreement is still in effect, having a duration clause which made it "amendable" as of July 31, 1984 upon the service of notice of intended change.

On page 6, TWA inaccurately states that Count I of IFFA's complaint asks for displacement of "all" of the approximate 1280 cross-overs. In fact, not only the complaint (53a-54a), but the stipulations of fact (61a), and IFFA's motion for summary judgment (64a-65a) make it quite clear that it was seeking to enforce the right of full-term strikers to displace only those cross-overs being retained with less seniority.

There is also a misstatement at page 7 in the petition, where TWA first describes the Eighth Circuit's "curious rationale"—that the trainees were not "employees" as defined by the RLA and, thus, could not be permanent strike replacements—and then goes on to claim that this had not even been argued by IFFA before the lower courts. This is simply not the case. While it was stipulated that these trainees were hired and told by TWA that they were employees, the thrust of IFFA's argument before both of the lower courts was that they were not "flight attendant employees", i.e., bargaining unit employees, because they had not yet completed their training and were, therefore, not yet ready to begin performing the work of flight attendants for TWA.

Finally, it should be noted, with respect to the fact recited by TWA on page 6 regarding its having filled the 200 or so vacancies which existed at the time the strike

ended by "rehiring" strikers, that TWA actually recalled the approximate 200 full-term strikers to fill these vacancies in the order of their contractual seniority.

Specifically, the Eighth Circuit's decision is grounded on the basic principle articulated by this Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), that economic strikers are entitled to reinstatement to their former jobs upon their unconditional offer to return to work. This is coupled with the principle established in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) which restricts an employer's right to implement any policy which would adversely affect employees' job security, job selection, or other benefits because of their participation in a strike. The decision below stresses the point that a discriminatory grant of permanent strike replacement status to the cross-over employees regardless of their seniority relative to other striking employees differentiates between the employees strictly on the basis of the degree of their union activity. This, in turn, is likely to create long-term conflict among the two artificially divided groups of employees. With respect to the trainees' issue, the decision below was based upon a reading of very clear statutory language and buttressed by recent precedent in the Seventh Circuit interpreting that language, as well as relying upon reasoning found in analogous NLRA precedent. With respect to each issue, the Eighth Circuit correctly recognized that this Court's holding in the *Mackay* decision [1] upon which TWA places principal reliance in seeking this review, is but an *exception* to the general principle concerning an economic striker's entitlement to reinstatement. This was made especially clear in this Court's holding in *NLRB v. Fleetwood Trailer Co.*,[2] and, as the decision below also found, such an exception should be narrowly construed rather than broadly expanded as TWA urges.

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[1] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[2] 389 U.S. 375 (1967).

The petition for certiorari should be denied because, as we hereafter show, the Eighth Circuit's decision below on each question is in accordance with the existing precedent in this area of the law, and the claimed conflicts with other decisions do not exist.

ARGUMENT

I. The Eighth Circuit's Decision Finding TWA's Grant Of Permanent Replacement Status To Its Cross-over Employees To Be Unlawful Discrimination Under The RLA Is In Harmony With This Court's *Mackay* And *Erie Resistor* Decisions And Does Not Conflict Materially With Decisions Of The Sixth And Seventh Circuits.

A. *The court's rationale is based upon the traditional balancing of the rights of the employer and employees in a strike situation which the courts and the NLRB are consistently called upon to do.*

In reaching its decision regarding the cross-overs' issue, the Eighth Circuit did nothing more than to correctly apply the fundamental principles set forth in this Court's decisions in *Fleetwood Trailer* and *Erie Resistor* as they applied to the unique set of facts in the underlying case. Essentially these principles call for a balancing of the right of employees engaged in an economic strike to be reinstated to their former or substantially equivalent positions upon their unconditional offer to return to work, and the employer's right to attempt to continue to operate his business during the strike hiring permanent *replacements* if necessary to fill vacancies left by the strikers. *NLRB v. Fleetwood Trailer Co., supra*, at 378; *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

The application of this balancing test can be sometimes difficult, and in no sense is one side's right preordained, as is shown by the Eighth Circuit's affirmation

of the district court's ruling on the so-called new hires category—that *they* were permanent strike replacements—which was contrary to IFFA's position taken in this litigation. Thus, the decision below reflects nothing other than adherence to the *Mackay permanent replacement exception* to the general well-established principles of *Fleetwood* and *Erie Resistor*. Rather than an anomaly or a curious result as alleged by TWA, the lower court decision merely adheres to the *Mackay* exception (which, in every application here, results in non-seniority individuals continuing to work after the strike at the expense of more senior incumbent employees) by recognizing that some 2200 senior full-term strikers were replaced by new hires as *permanent replacements;* and it adheres to *Fleetwood* and *Erie Resistor* by recognizing that as to all other striking employees *not* permanently replaced, TWA impermissibly discriminated on the basis of union activity by allocating jobs on the basis of the extent of participation in a lawful and protected strike.

The decision below clearly focused on the question central to this issue, namely, whether the cross-overs could be given or "awarded" the status of permanent strike *replacements* as defined in the *Mackay* holding. The court correctly concluded that they could not, and, that for the petitioner to have attempted to grant such a status to them and retain them at the end of the strike in preference to more senior, full-term striking employees was unlawful discrimination based upon the principle set forth in *Erie Resistor*. More specifically, while recognizing that there were certain factual differences between *Erie Resistor* and the underlying case, with the former involving a grant of post-strike super-seniority, the decision below recognized that the same concerns voiced in *Erie Resistor* were present here in this case. These concerns called for a condemnation of a grant of any type of benefit (pre-strike or post-strike) which would be so "inherently destructive" of the right to strike as

to be unlawful discrimination without the need of further inquiry into the employer's motivation. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967); *George Banta Co., Banta Div. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). In the underlying case, the court found the grant or "awarding" of permanent *replacement* status to the cross-overs to be just such a discriminatory grant of a benefit to be condemned under the principles of *Erie Resistor*. It rejected TWA's arguments that the granting of such a status is a corollary of both the employees' right to refrain from engaging in strike activity and the employer's right to retain these cross-over employees as an alleged element in its array of self-help weapons available to it during a strike.

Rejecting the principal thrust of TWA's argument herein, the court found that the *Mackay* exception was not applicable because of its finding that cross-overs do not acquire the status of permanent *replacements*. Contrary to TWA's urging, however, this finding does not represent a departure from the established law governing reinstatement of economic strikers; it constitutes at best merely a refinement of that law given the particular context of this case, arising as it did under the RLA and with a substantial number of the terms of the parties' collective bargaining agreement including the union security provision still remaining in effect during the strike.

The continued existence throughout the strike of the collective bargaining agreement and its union security clause were indeed relevant considerations forming a part of the basis for the Eighth Circuit's finding of discrimination. The finding of discrimination was based not upon union membership in and of itself but upon the *degree* of the members' union activity, i.e., how long they stayed on strike. This form of discrimination is just as invidious and with the same long-term divisive

effects as that which was condemned by this Court in *Erie Resistor*.[3]

B. *The court's ruling does not materially alter the balance of bargaining power between employers and unions or materially conflict with application of these basic principles by other circuit courts.*

In urging review of this case, TWA made several incorrect statements as to certain alleged rights of employers and employees during an economic strike. As an example, there is no authority for the statement that an employer has the right, as one of his "principal self-help weapons" under the RLA, or under the NLRA for that matter, to retain cross-over employees on a permanent basis the same as he does with new hire strike replacements by virtue of the *Mackay* exception. To the contrary, as the court noted in its opinion below, neither the Seventh Circuit in its decisions in the *J. L. Clark Co.* and *Giddings* cases nor the Eighth Circuit itself in the *Randall* case[4] lend support to the proposition that an employee who abandons a strike and crosses over to

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[3] Perhaps even more so under the RLA, there has been a good deal of emphasis placed upon the "community" of striking employees. In *BRAC v. FEC Railway Co.*, 384 U.S. 238 (1966), this Court stated:

> These collective bargaining agreements [under the RLA] are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation. (384 U.S. at 246)

The Eighth Circuit's reliance upon the continued existence of the collective bargaining agreement is in harmony with this emphasis.

[4] *International Ass'n of Machinists & Aerospace Workers v. J. L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972); *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982); *Randall, Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

work during that strike acquires the status of a permanent replacement under the *Mackay* exception.

In another attempt to divert attention from the real issues herein, TWA speculates that the decision below would tend to eliminate "the principal motivation" that employees with less seniority supposedly would have to abandon a strike and return to work, this motivation being to assure themselves that they would still have a job at the end of the strike at the expense of the more senior full-term strikers. IFFA submits that whether this presumed motivation is likely in the minds of most returning strikers, or whether it might be one or more of the many other considerations which can motivate an employee to cross over a picket line and abandon his fellow strikers, is not particularly relevant to the issues with which the lower court dealt. Reduced to basics, TWA's argument is that, as a part of its arsenal of self-help weapons, it must be able to promise employees that if they abandon a strike that they earlier began, they can leapfrog over the backs of their fellow employees and fellow strikers and assure themselves a higher place of employment. This is contrary to the Act and is greatly beyond the scope of the limited *Mackay* exception that allows an employer to promise permanent employment to *replacements*. The notion that employees can vote for a strike, begin that strike and then turn that strike to their own personal advantage by jumping ahead of their co-strikers has no precedent under the letter of the spirit of the Act or any judicial interpretation of that Act. In any event, the decision below properly focused upon the elimination of the unfairness of allowing an employer to grant preferences in reinstatement to economic strikers based solely upon the degree of their strike participation, which is after all the primary if not the ultimate form of union activity.

TWA places a great deal of reliance upon its assertion that the Eighth Circuit's ruling on the cross-overs con-

flicts with the Sixth Circuit's decisions in *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) and *NLRB v. American Olean Tile Co.*, No. 86-5308 (6th Cir. August 13, 1987) and with the Seventh Circuit's decision in *Giddings & Lewis, Inc. v. NLRB, supra.* This claimed conflict simply does not exist.[5]

The cross-overs' issue involved in the decision below was never squarely before the Sixth Circuit in either of these cases nor was it before the Seventh Circuit in *Giddings* at all, as the court below pointed out. In *Harrison Ready Mix*, the issue before the Sixth Circuit panel involved whether certain cross-overs *themselves* had been discriminated against by post-strike preferential treatment which had been accorded certain new hire permanent replacements. It did not even involve a claim of discrimination against full-term strikers. In the *American Olean* case, the issue before that panel, as the dissent makes clear, was whether returning strikers, in this instance cross-overs who had abandoned the strike, are *fully* reinstated if they decide to accept offers to fill jobs which are undisputedly not their former positions nor even substantially equivalent ones. The panel majority, in disagreement with the NLRB and union in that case, found that "[t]he law requires reinstatement [of economic strikers] when a vacancy occurs for which an offeror (sic) is qualified, whether in his previous position or a substantially equivalent one or not." Moreover, the union's contention in *American Olean* was that the discrimination against the strikers occurred in connection with post-strike preferential transfers from one plant location to another, which reveals further the dissimilar-

[5] TWA is unable to claim that the decision below conflicts with any decision which has been decided under the *RLA* by another circuit court where, as is true in the instant case, there is the finding unique to the RLA of the continuation of the collective bargaining agreement during the strike due to its "amendable" character.

ity of the issue in that case compared to the one for which review is requested herein.

II. The Decision Below Affirming The District Court's Ruling That The Approximate 463 Trainees Did Not Acquire The Status Of Permanent Replacements Draws Its Essence From Prior Judicial And NLRB Precedent And Is Not In Conflict With The Second And Seventh Circuits.

A. *Contrary to being in conflict with the Seventh Circuit, the Eighth Circuit's decision as to the trainees' issue rests primarily upon the Seventh Circuit's* ALPA v. United Airlines *decision.*

The Eighth Circuit concluded that the Seventh Circuit's decision in *ALPA v. United Airlines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987), and specifically its RLA employee definitional test (802 F.2d at 913), was dispositive of the trainees' issue in the underlying case. The court below considered the factual differences between the *ALPA* case and the instant one to be irrelevant, and its reliance upon the express terms found in the "employee" definition under Section 201 of the RLA (45 U.S.C. § 181) is a sound and reasonable interpretation of that Act. The "work performance factor" which the court found lacking with regard to these trainees is certainly an essential element in the definition of an employee under the Act. Arriving at the conclusion, then, that these trainees could not have acquired the status of permanent replacements at the time that the strike ended is a logical and reasonable one, in harmony with the spirit and purpose of the RLA.

In its petition, TWA engages in hyperbole when it makes the claim, at page 19, that the Eighth Circuit by its ruling that the trainees' lack employee status has ". . . eliminated, with a few conclusory paragraphs, the organizational and representational rights of an untold number of employees . . ." As the court took pains to point out, its ruling is even consistent with the treatment

that both the carrier and the Union accorded the trainees in the past, indeed all the way up to the beginning of this strike. Trainees were never included within the bargaining unit nor covered by any of the collective bargaining agreement terms. They were not even considered to be "employees" as defined by the Fair Labor Standards Act.[6]

In the same vein, TWA's protestations that the holding is contrary to the rulings of the National Mediation Board are misplaced. The NMB is charged with deciding pure representational disputes under the RLA which includes conducting hearings on elections and determining voter eligibility issues. In terms of determining who is eligible to vote in an election, the Board usually takes an expansive approach in arriving at eligibility decisions in order to avoid disenfranchisement of voters. Representative of this approach has been the Board finding eligible to vote individuals such as furloughed or laid-off employees, dischargees who have pending grievance claims seeking reinstatement, employees on extended leaves of absence, and even former employees who have been terminated as a class but who are plaintiffs in a lawsuit challenging their terminations. *Air Canada v. NMB*, 107 LRRM 2028, 2032 (S.D. N.Y. 1980), aff'd, 659 F.2d 1057 (2nd Cir. 1981), *cert. denied*, 454 U.S. 965 (1981). Thus, an NMB ruling, such as the one cited by TWA determining trainees to be eligible voters, arises in a context governed by rules and policies which is different than that which the court below addressed.

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[6] In a 1983 unpublished decision, *Donovan v. Trans World Airlines, Inc.*, No. 77-0881 (W.D. Mo. March 4, 1983) (reprinted as Appendix L), the district court ruled that flight attendant trainees in TWA's training academy did not meet the definition of "employees" under that Act in an action brought by the Secretary of Labor pursuant to the minimum wage, overtime and record-keeping provisions of the Act (29 U.S.C. § 201, et seq. See also, *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982).

B. *In finding support for its ruling on the trainees' issue from NLRA precedent as well, the court correctly analyzed and applied the balancing test found in* Mackay.

The court correctly noted that there was indeed a "balancing test" applied by the *Mackay* court when it established the exception allowing an employer during an economic strike to hire and permanently retain replacements for strikers without committing an unfair labor practice under the NLRA. In its decision below, the Eighth Circuit's conclusion, that this balance tips in favor of IFFA's position because of the lack of any visible business need for TWA to place these trainees into working positions after the strikers had already unconditionally offered to return to work, is a rational application of the *Mackay* decision.

Contrary to TWA's additional assertion, moreover, the court did not make a *factual* finding regarding the lack of a business need; it merely applied the principles of law found in *Mackay*, *Fleetwood* and *Erie Resistor* to the stipulated facts in the record.

C. *The Eighth Circuit did not invalidate the district court's two-day rule; it simply found the RLA employee definitional approach to be controlling.*

TWA's supposition that the Eighth Circuit recognized the district court's two-day rule or training school exception as being "invalid" is not well-founded. A fair reading of the court's decision with respect to this issue reveals that it simply chose not to adopt the district court's rationale in view of the more compelling RLA precedent offered by the *ALPA v. United Airlines* decision, coupled with its analysis of the facts in the instant case in light of the RLA's express terms found in the definition of an employee.

The court further observed that the district court had not had the benefit of the Seventh Circuit's *ALPA* opin-

ion at the time it was called upon to decide this issue, but it did not necessarily take issue with the district court's analysis which had focused almost entirely upon NLRA precedent. Indeed, the Eighth Circuit agreed with the district court that the NLRA case precedent supports the finding that the trainees had not acquired the status of permanent replacements at the time the strike ended. (13a).

CONCLUSION

The respondent Independent Federation of Flight Attendants urges the denial of the certiorari petition.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
W.D. MISSOURI, W.D.

No. 77-0881-CV-W-9

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

TRANS WORLD AIRLINES INC.,
Defendant.

March 4, 1983

RALSTON.

[Statement of Case]

Magistrate: This is an action brought by the Secretary of Labor (Secretary) pursuant to the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., against Trans World Airlines, Inc., (TWA) to obtain injunctive relief prohibiting future violations of the Act, and to recover backwages and liquidated damages.[1] The Secretary asserts that since December 12, 1974, TWA has

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[1] The action has been assigned to the undersigned United States Magistrate for trial and decision pursuant to the Magistrate Act, 28 U.S.C. § 636(c), upon the written consent of the parties. The proceedings have been delayed pending resolution of the American Airlines litigation concerning the operation of a similar training facility for flight attendants. See Donovan v. American Airlines, Inc. [92 LC P 34.079] 514 F.Supp. 526 (N.D. Tex. 1981), affirmed [95 LC P 34,258] 686 F.2d 267 (5th Cir. 1982).

violated the Act by failing to pay minimum wage benefits and overtime pay to individuals while they were trained as flight attendants and by failing to keep accurate pay records. TWA, on the other hand, contends that persons in training as flight attendants were not entitled to the benefits of the Act, and therefore neither the minimum wage and overtime, nor the recordkeeping requirement of the Act have been violated. Because the testimony and evidence presented at trial, when viewed in light of existing law, supports the position of TWA, judgment will be granted in its favor and against the Secretary.

TWA is a major commercial airline engaged in domestic and international air transportation.[2] It maintains a part of its headquarters in Kansas City, Missouri. In operating its business, TWA must train and employ individuals for various flight crew positions,

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[2] The parties have stipulated, among other things, the following:

(a) TWA is an enterprise within the meaning of Section 3(r) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §§ 201, et seq.);

(b) TWA is an enterprise engaged in commerce within the meaning of Section 3(s)(1) of the Act;

(c) Since December 12, 1974, TWA has had employees engaged in commerce including employees handling or otherwise working on goods or materials that have been moved in or produced for commerce;

(d) TWA is a carrier by air subject to the provisions of 45 U.S.C. §§ 181-188;

(e) TWA is an air carrier engaging in interstate and overseas air transportation under a Certification of Public Convenience and Necessity or other appropriate economic authority issued by the Civil Aeronautics Board (CAB);

(f) TWA is a certificate holder within the meaning of 14 C.F.R. Part 121, subparts G, M, N, O, and T subject to the provisions of that Part.

including, among others, that of flight attendant.[3] The controversy herein primarily concerns the relationship between TWA and persons selected for flight attendant training during the first four weeks of the instructional course offered by TWA at its Breech Training Academy in Overland Park, Kansas.[4] Simply stated, if persons in the first four weeks of flight attendant training are "employees" under the Act, specifically the provisions of 29 U.S.C. §§ 203(e)(1) and (g), then TWA is required to pay them the minimum wage and overtime benefits specified by 29 U.S.C. §§ 206 and 207, and to maintain appropriate pay records. If those persons should not be so characterized, then TWA has not violated the Act with respect to them.

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[3] Federal Aviation Regulations provide that the persons constituting the minimum complement of flight attendants required by 14 C.F.R. § 121.391 must have received the training specified by those subsections of 14 C.F.R. §§ 121.415, 121,417 and 121.421 applicable to flight attendants and the type of aircraft on which they serve as flight attendants. The flight attendant training program for safety and emergency procedures required of TWA must be approved by the Administrator of the Federal Aviation Administration (FAA). TWA need not be the entity giving the training required for flight attendants before they are qualified to serve as crew members aboard TWA aircraft. Training to qualify persons to serve as flight attendant crew members of TWA aircraft may be given by a training facility entirely independent of and having no affiliation with TWA provided the training curriculum at the non-affiliated facility with respect to safety and emergency procedures is approved by the Federal Aviation Administrator for flight attendants who would serve on aircraft of the type and model operated by TWA. However, at no time since December 12, 1974, has TWA allowed any person hired since that date to serve as a flight attendant on its aircraft without satisfactorily completing the flight attendant training course given by TWA at its Breech Training Academy.

[4] The facility is located in the greater Kansas City metropolitan area.

Findings of Fact

Through the years, the job of flight attendant has proven highly desirable to a large number of people. In meeting its flight attendant needs, TWA has selected a few hundred potential flight attendants from literally tens of thousands of applicants. For example, during the years 1975 through 1978,[5] TWA selected between approximately 450 to 980 persons [6] for flight attendant training from the approximately 25,000 to 60,000 persons who applied.[7] Of those selected for flight attendant training, between 85% to 95% successfully completed the course of training administered by TWA and went "on line." [8]

In selecting persons for flight attendant training from the thousands of applicants, TWA narrowed the field by

[5] Although the Secretary seeks continuing relief, the testimony and evidence at trial focused on a period commencing on December 12, 1974, and continuing through December 12, 1977. In recent years, the business of the airlines has changed radically, causing a sharp decline in the need for new flight attendants. For that reason, TWA has largely discontinued use of the Breech Training Academy for training its own flight attendants, although it has used the facility for training flight attendants for other airlines. TWA has contemplated the sale of the facility.

[6] The following number of flight attendant trainees attended classes at the Breach Training Academy during those years: 1975-820 persons; 1976-458 persons; 1977-985 persons; 1978-505 persons.

[7] The following number of persons applied for the position as flight attendant during those years: 1975-28,600 applicants; 1976-30,900 applicants; 1977-62,500 applicants; 1978-25,400 applicants.

[8] The following number of flight attendant trainees who were trained and graduated from the training course at Breech Training Academy went "on line" during those years: 1975-778 flight attendants; 1976-410 flight attendants; 1977-837 flight attendants; 1978-476 flight attendants. However, at least one witness at trial testified that she was furloughed immediately after her training and did not go "on line" for a period of time.

employing an application and interview process [9] designed to identify those persons who met its standards, could successfully complete the training course, and were likely to continue as flight attendants after training. TWA attempted to forecast its "on line" vacancies so as to match the number of graduating flight attendants to those vacancies. To make a determination of its flight attendant needs, personnel of TWA's Departments of In-Flight Services and Budget Control took into consideration historical data concerning the levels of business during given months, vacations, resignations, sick and injury leaves, training completions, and other relevant factors. Because the business of the airlines is largely seasonal, TWA personnel attempted to adjust for peak and slack periods. As accurately as possible, they matched vacancies with trained flight attendants throughout the seasons.[10] Judging from their results, they were successful in that endeavor. They predicted their flight personnel needs "within one to two percent accuracy." [11]

[9] Prior to acceptance into the flight attendant training at the Breech Training Academy, applicants underwent three separate screening interviews and a complete physical examination.

[10] In 1980, the Department of Transportation, in an "Aviation Careers Series" publication entitled "Aviation Education," noted that "[t]he value of the airlines flight attendant training program amounts to several thousand dollars per student." In fact, one witness at trial testified that Braniff International Airlines once charged more than $300 in tuition for its flight attendant training. Obviously, the cost to TWA was equally high. Therefore, it was imperative for TWA to achieve a high level of forecasting accuracy in matching trainees to vacant positions to provide a sufficient number of flight attendants on the one hand, and to aviod unnecessary expenses in training unnecessary flight attendants.

[11] Despite this success rate, the graduating trainees did not always immediately step into "on line" positions. At least one witness at trial testified that she was furloughed for a period of time after her training because of a slump in business. Also, the parties have stipulated that at one time TWA overestimated its need for flight attendants.

Prior to their acceptance for flight attendant training, applicants were advised, in writing, that they would not be considered employees of TWA until their successful completion of flight attendant training. They each signed a written "Flight Attendant Application Agreement" by which they acknowledged that fact. Moreover, each flight attendant trainee understood that no compensation would be paid by TWA during the period of their training at the Breech Training Academy and that they would not be compensated until they went "one line." While a few flight attendant witnesses testified at trial that they felt they had been "hired" by TWA upon their acceptance for training, virtually to a person this feeling was based upon confidence that he or she would successfully complete training.

[Training Facility]

All TWA flight attendant trainees who were trained during the relevant period of time attended the Breech Training Academy.[12] While there was no written policy that required trainees to live at the training facility, trainees were expected to do so, and few, if any, flight attendant trainees resided outside the Academy during training. The Academy is a large, modern facility which incorporates several "living and learning centers," each designed to accommodate a class of twenty persons. In many respects, both the physical surroundings and the educational atmosphere resemble that of a college

[12] It is stipulated that "[d]uring the period of time embraced by [the Secretary's] action TWA's internally established policy was not to assign persons to active duty as flight attendants unless they had received and satisfactorily completed at TWA's Breech Training Academy the initial training required by [federal regulations]." In addition to the federally-mandated safety and procedures training, TWA also required its flight attendant trainees to complete other phases of its training course, even if they had previously qualified to serve as flight attendants on the type of aircraft operated.

campus. The living areas include rooms "like a nice hotel room, a Hilton class, or a Marriott class hotel room." Each individual room measures approximately 20′ by 20′ and contains two beds, a study carrel with a large desk and indirect lighting, and a private bath. The rooms are grouped around a central "sunken pit" conversation area which is equipped with a color television set and lounge furniture. In addition, the Academy includes a swimming pool and tennis courts. Meals are provided in a central cafeteria. The learning centers were designed to accommodate the most modern teaching methods.[13] They include classroom seating, advanced audio-visual equipment and aircraft mockups for "hands on" training.

During the first four weeks of training, flight attendant trainees received no wages or monetary compensation from TWA. However, TWA did provide them with direct subsistence in the form of meals, lodging, ground transportation, and health and accident insurance.[14]

At the beginning of the training program, each trainee was fitted for a TWA uniform. They were not, however, required to pay for that uniform until they began their "on line" duties after training. If they

[13] Although the Academy was primarily designed for the training of flight attendants, it has been used as an educational facility by such diverse organizations as the Department of Labor, the Department of Agriculture, and an accounting firm.

[14] It is stipulated that "[p]ersons attending TWA's flight attendant training program at the Breach Training Academy are provided without cost to them, among other things, room and board during the first four weeks of their training" and that "TWA furnishes persons attending its flight attendant training program at the Breech Training Academy with ground transportation by scheduled bus service, at no cost to them, as required by the training program and also for their personal desires or pleasure on weekends to areas for shopping and for church services."

failed to complete flight attendant training, trainees could return their uniforms and were not charged for them.

In the first week of training, the trainees were required to complete pay records and documentation so as to give the payroll department sufficient lead time in which to prepare the necessary paperwork prior to the first paycheck. The trainees were paid for their work following the fourth week of training and received the first paycheck after having been "on line" for two weeks. The union initiation fee was deducted from the first paycheck. Seniority for the purposes of such matters as furloughs, domicile bidding and layoffs was computed from the first day of training. However, seniority for the purpose of determining compensation was figured from the first day of "on line" service. The union did not represent trainees until they were "on line" and trainees were not obligated for union dues until then. Trainees were required to join the union within their first sixty days of service with TWA. A flight attendant remained on probation status for the first five months of service after graduation from the Academy.

[Flight Attendant Training]

The flight attendant training program at the Breech Training Academy spanned approximately four and one half weeks.[15] Trainees attended classes five days each week, eight hours each day, with an occasional Saturday field trip for evacuation training. During that period of time, the trainees received no training or instruction on flights carrying passengers; they replaced no "on line" TWA employees; they did not supplement the work of any "on line" employee; and they did not assist on any commercial flight. Slightly less than half of the training was devoted to instruction concerning the safety and emergency procedures training required by the reg-

[15] About 162 total hours of classroom instruction.

uiations of the Federal Aviation Administration (FAA) for passenger airlines.[16] That training specifically related to the procedures and equipment employed on the particular aircraft owned and operated by TWA.[17] In addition to the training required by the FAA, TWA trained its student flight attendants in a myriad of other subjects, including such things as aviation history and flight principles, personal grooming,[18] public and personal communications,[19] food and liquor preparation, foreign currencies, physical fitness, and personal finances.

[16] The TWA Manager of Flight Safety Training testified that TWA's approxed program requires 24 hours of instruction for domestic flights and an additional 7 hours of training for international or "over-water" operations. Apparently, TWA has offered more instructional hours in these subjects than required.

[17] Primarily, the Boeing 727, 747, 707 and the Lockheed 1011. Other domestic airlines operate different aircraft such as the European Airbus Industries A300B, the McDonnell-Douglas DC-10, the McDonnell-Douglas DC-8, and the Boeing 737. TWA has not provided training to its flight attendant trainees on these aircraft. The aircraft purchased by TWA are standard models of the manufacturer except they may have seat arrangements, galley equipment and locations, and some emergency equipment specified by TWA. Under federal regulations, each certified air carrier may prepare its own procedures for implementing the flight attendant training requirements of the FAA, subject to the approval of the agency. Each certified air carrier may select the emergency equipment installed in its aircraft from approved emergency equipment offered by different manufacturers. Similarly, each certified air carrier may select the type of first air situations for which it will give instruction to its flight attendant trainees, subject to the FAA requirement that such training cover the kinds of illnesses most frequently encountered in flight.

[18] TWA has presented its grooming course to such diverse non-industry groups as students at Rockhurst College and employees of the United Telecom Company.

[19] The communications course has incorporated sophisticated "behavioral skills" training. It has been presented to bank groups, hospital groups, rental car groups and other non-industry groups involved in "one-on-one" customer communications.

Although the training offered by TWA to its trainees at the Breech Training Academy was specifically geared to TWA passenger service and equipment, much of that training could be utilized in service on other airlines and in other fields of endeavor.[20] During the period in question, most major airlines, with some exceptions, required even experienced flight attendants to complete their own training courses before their "on line" duties commenced. That requirement was largely dictated by the training economics of the period.[21] But that fact does not demonstrate that the training acquired by TWA flight attendants is not transferable. To the contrary, the evidence at trial clearly established the transferability of the technical, FAA-required flight attendant training. Admittedly, the seat configuration and equipment of specific types and models of aircraft varies from airline to airline. But the variances between aircraft of the same type and model are slight. While all airlines do not utilize the same aircraft, there is a high degree of overlap in the models and types of aircraft

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[20] Similar flight attendant training was, and present is, offered by junior colleges, preparatory schools and community colleges. Because of the facilities owned by TWA, the "on line" experience of its instructors and the intensity of the instructional course, the quality of flight attendant training is superior at the Breech Training Academy than that offered by non-industry educators. The evidence at trial indicated that non-industry educators often drew heavily upon training materials used by TWA and American Airlines for their course preparation. Students are clearly willing to enroll in non-industry courses even though they will be retained by the major airlines before they can serve as flight attendants.

[21] During the period in question, a shortage of trained flight attendants existed in the industry. Thus, while TWA might have selected an experienced flight attendant for training, the economics involved made it less expensive to put that person through the full training course rather than tailor an individual course for that person. TWA's Manager for In-Flight Services testified that because a large number of trained flight attendants are now available, he contemplates hiring trained flight attendants and abbreviating the traditional training course, thus reducing training costs.

flown by the major airlines. Obviously, TWA does not train its flight attendants for service on aircraft which it does not own or operate, and is not required to do so. But it does train flight attendants for service on types and models of aircraft which are operated by many other airlines. And under FAA regulations, flight attendants can be qualified for service on those other airlines with marginal training, consisting of "differences" instruction by written bulletins or short instructional courses. For example, in one instance, furloughed TWA flight attendants were qualified for service with National Airlines based upon only five days training, including DC-9 and wet ditch training which they had not received at the Breech Training Academy. In many instances, TWA has leased aircraft from other airlines, including British Airways, Eastern Airlines and Northeast Airlines and has qualified its flight attendants with "differences" training by written bulletins and brief instructional courses at the various domiciles.

It was also established at trial that the non-technical training offered by TWA was highly transferable. Flight attendant witnesses testified that such training was readily transferable to service on other airlines, despite minor differences in "service flows"[22] and marketing techniques or strategies. And repeatedly, wit-

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[22] "Service flows" are simply the procedures employed in the delivery of food and beverages to the passengers. Basically, the essential services offered by the major airlines are the same. As one witness put it: To the layman, the differences between [two airlines] . . . amounts to on United you probably get macademia nuts; on TWA you get almonds. [O]n United they serve a sirloin, and we serve a chauteau briand. It looks the same. Its simply marketing. The concern of all airlines is to deliver service as quickly, cheaply and efficiently as possible. In that respect, most airlines arrive at the same solutions whether it be by imitation or by innovation. Thus, the "service flows" on a given type of aircraft are largely the same from airline to airline.

nesses testified that their training was applicable to endeavors other than careers as flight attendants.[23]

Conclusions of Law

Under the Fair Labor Standards Act, specifically Sections 206 and 207 of Title 29, U.S.C., an employer must pay minimum wages and overtime benefits to employees who are engaged in activities covered by the Act. The Act describes the employer-employee relationship in the broadest terms. An "employee" is "any individual employed by an employer." 29 U.S.C. § 203(e)(1). "Employ," as defined by the Act, means "to suffer or to permit to work." 29 U.S.C. § 203(g). Indeed, it has been said that "[t]he term 'employee' is used in the broadest sense ever . . . included in any one act. Donovan v. American Airlines, Inc., [95 LC P 34,258] 686 F.2d 267, 271 (5th Cir. 1982), quoting United States v. Rosenwasser, [9 LC P 51,190] 323 U.S. 360, 363 (1945); Dunlop v. Carriage Carpet Co., [80 LC P 33,465] 548 F.2d 139, 143 (6th Cir. 1977); and Shultz v. Hinojosa, [63 LC P 32,367] 432 F.2d 259, 264 (5th Cir. 1970). Through the years, the language of the Act has been interpreted to achieve its intended purposes, rather than to effect a rote application of its requirements based upon common law principles of employment law. See, e.g., Walling v. Portland Terminal Company, [12 LC P 51,236] 330 U.S. 148, 150-151 (1947); Rutherford Food Corporation v. McComb, [12 LC P 51,254] 331 U.S. 722 (1947); Weisel v. Singapore Joint Venture, Inc., [87 LC P 33,834] 602 F.2d 1185 (5th Cir. 1979); Mednick v. Albert Enterprises, Inc., [76 LC P 33,205] 508 F.2d 297, 299-300 (5th Cir. 1975). The Act is to be read against the "economic reality" of a given case. Goldberg v. Whitaker House Co-op, Inc.,

[23] Former flight attendants testified that they developed poise and confidence translatable to such diverse fields as education and sales.

[42 LC P 31,090] 366 U.S. 28, 33 (1961); Weisel v. Singapore Joint Venture, Inc., supra; Real v. Driscoll Strawberry Associates, Inc., [86 LC P 33,821] 603 F.2d 748, 754-755 (9th Cir. 1979).

In two cases, Walling v. Portland Terminal Company, supra, and Walling v. Nashville, Chattanooga & St. Louis Ry., [12 LC P 51,237] 330 U.S. 158 (1847), the Supreme Court examined the Fair Labor Standards Act in the context of apprentice training programs. Portland Terminal involved the training of prospective yead brakemen by a railroad company. Each trainee was required to complete an initial training course averaging seven or eight days in duration. They then were given on-the-job training by experienced brakemen, learning first by observation and later by performing actual work under close supervision. Trainees who successfully completed the training course became qualified brakemen available to the railroad. However, until they were called to fill vacancies, trainees did not replace regular employees in the railroad. After training, the trainee brakemen retroactively received a modest amount of compensation after their training period which did not meet the requirements of the Fair Labor Standards Act.

Despite the fact that trainees ultimately formed an immediately-available and qualified pool of brakemen, the Supreme Court held they were not "employees" under the Act. Because they "work[ed] for their own advantage on the premises of another," trainees were not "suffer[ed] or permitted to work," as that phrase is used in the Act. 330 U.S. at 152. They were not "employees" because the company received no "immediate advantage" from their efforts during training. 330 U.S. at 153. Comparing the trainees to students of a vocational school, the Court indicated that "[t]he Fair Labor Standards Act was not intended to penalize [the company] for providing, free of charge, the same kind of

instruction at a place and in a manner which would most greatly benefit the trainees." Id.

In Nashville, Chattanooga & St. Louis Ry., the Court reached the same result. There, the railroad had employed a training method called "cubbing" in which prospective railroad employees trained by accompanying a regular work crew and by performing the duties of a regular employee under his supervision. Upon demonstrating his proficiency at the end of training, the "cub" could then be called into service by the railroad when needed. "Cubs" were paid some compensation during the training course whether or not they successfully completed it. The training lasted several weeks. Even under those facts, the "cubs" were not "employees" under the Act.

[American Airlines Case]

The decisions in Portland Terminal and Nashville, Chattanooga & St. Louis Ry., are still viable precedent and have been followed in subsequent federal court decisions. See Ballou v. General Electric Company, [65 LC P 32,490] 433 F.2d 109 (1st Cir. 1970), cert. denied, [65 LC P 32,474] 401 U.S. 1009 (1971); Atkins v. General Motors Corporation, [93 LC P 34,179] 524 F. Supp. 307 (W.D. La. 1981); Bailey v. Pilots Association for the Bay & River Delaware, 406 F.Supp. 1302 (E.D. Pa. 1976). And recently, the principles of Portland Terminal and Nashville, Chattanooga & St. Louis Ry., have been applied to a modern flight attendant program nearly identical to that offered by TWA. In Donovan v. American Airlines, Inc., supra, the Fifth Circuit rejected the claim of the Secretary that American Airlines flight attendant trainees were "employees" entitled to the benefits of the Act. In American Airlines, the Court approved a balancing test which had been applied by the trial court based upon an analysis of "the relative benefits flowing to trainee and company during the training period." 686 F.2d at 271, quoting 514 F.Supp. 526, 533.

Under that test, the Court found, as had the trial court, that the balance of benefits tipped toward the flight attendant trainees rather than the company because (1) the company received no immediate economic benefit, but rather incurred only expense during the training course, (2) the trainees did not replace any regular airline employee or supplement their work, and (3) the skills acquired by trainees were, to a large degree, fungible and transferable. The fact that the flight attendant training was not an altruistic endeavor and was offered at company facilities did not change that conclusion.

[The airline's] schooling is but one step, albeit integral, in preparing novices for their jobs. Trainees make a sacrifice to attend school. But so do all who seek to learn a trade or profession. Centralized training is to [the airline's] advantage, but the airline has no duty to offer training at an inconvenient place. The training process is made more effective and less expensive by requiring full time attendance under [the airline's control and devoting it entirely to [the airline's own] policies. These factors do not, however, mean that trainees are working while receiving this instruction.

[M]any companies hire persons as employees and then pay them while they attend company schools. These employers are governed . . . by the demands of the market place and by their own specialized needs. The FLSA does not require [the airline] to follow this course. 686 F.2d at 272.

There is little to distinguish the present case from American Airlines. The training courses offered by both airlines covered almost identical subjects and employed similar teaching methods, using both "hands on" training in aircraft simulators and classroom instruction. Both courses were offered in similar campus-like facilities situated in a centralized location. The living and subsistence arrangements were nearly identical. Neither airline permitted trainees to work on regular commer-

cial flights to supplement the work of regular flight attendants until initial training was complete. Both airlines attempted to match the number of graduating trainees to their immediate need for flight attendants. In both instances, trainees acknowledged, in writing, that they were not employees of the airline until their successful completion of training. None of the trainees received compensation until after academy training was finished. Both airlines experienced a high graduation rate and offered jobs to an extremely high percentage of successful trainees. In all substantive respects, the two training operations were the same.

[Labor Secretary's Assertions]

The Secretary attempts to distinguish American Airlines on two grounds: first, he asserts, TWA, unlike American Airlines, assured its trainees a job upon graduation from the Breech Training Academy, and second, TWA trainees "received the responsibility and benefits of TWA's flight attendant union."

But neither of these assertions are supported by the evidence at trial. Although TWA enjoyed a high degree of success in placing graduating flight attendants into "on line" jobs, instances occurred in which it was required to place graduating trainees on furlough because positions simply were not open. Trainees were not contractually obligated to enter employment after graduation. Similarly, TWA did not obligate itself to offer employment to those trainees after graduation. More importantly, the fact that TWA was extremely accurate in its anticipation of flight attendant needs does not alter the basis relationship between trainee and company, nor the "economic reality" of that relationship. Clearly, during the first four weeks of training, TWA operated a school from which it derived no immediate benefit.

Moreover, the Secretary's assertion that trainees enjoyed union representation during the first four weeks

of training is simply factually incorrect. Under the collective bargaining agreement in force after August 1, 1978, the sixty-day period for joining the union was computed from the first day of training. But union dues and initiation fees were not paid until flight attendants went "on line." And no union representation was extended to flight attendants in discipline and grievance proceedings until they had joined the union and had completed their five-month probationary period.[24]

The conclusion that trainees are not "employees" under the Act is reinforced by the application of the criteria established by the Wage-Hour Administrator. In Section 10(b)(11) of the Wage and Hour Division Field Operations Handbook, the Administrator has identified six criteria for determining whether trainees are employees.[25] As explained in American Airlines, those criteria compel the conclusion that flight attendant trainees are not employees under the Act.

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[24] Similarly, the practice of TWA personnel to refer to trainees and probationary flight attendants as "new hires" is not significant. That term was primarily used to demote probationary flight attendants who had completed their initial training and gone "on line." And, as explained by TWA witnesses, it could have easily been interchanged with other terms commonly used for green recruits such as "freshman," "plebe," or "rookie."

[25] The criteria are:

(1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

(2) the training is for the benefit of the trainees;

(3) the trainees do not displace regular employees, but work under close observation;

(4) the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded.

(5) the trainees are not necessarily entitled to a job at the completion of the training period; and,

(6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

[T]he training is similar to that given at vocational schools: the training is for the benefit of the trainees; the trainees do not displace regular employees and work under close observation; the employer derives no immediate benefit from the training; the trainees are not necessarily entitled to a job at the conclusion of training; and the employer and the trainee understand that no wages will be paid for the training.

686 F.2d at 273. An application of those criteria in the context of this case mandates the same result.

Finally, the Secretary argues that TWA trainees should be considered employees because they follow "the usual path of an employee." However, a reading of the cases relied upon by the Secretary reveals that they do not involve training situations. Instead, they concern the application of the requirements of the Act to existing, productive relationships in which immediate benefit was conferred upon the employer. See Rutherford Food Corporation v. McComb, 331 U.S. 722 (1947); Donovan v. Tehco, Inc., [91 LC P 34,007] 642 F.2d 141 (5th Cir. 1981); Tobin v. Anthony Williams, 196 F.2d 547 (8th Cir. 1952). The teaching of those cases does not change the result here.

For the reasons stated above, it is therefore

Ordered and Adjudged that judgment be entered in favor of defendant Trans World Airlines, Inc., and against plaintiff Donovan, and that the claims of plaintiff be dismissed with prejudice. Costs are to be assessed against plaintiff.